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No. 09-632

Supreme Court, U.S.
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In The

Supreme Court of the United States

ERLINDA DOMINGUEZ,

Petitioner,

v.

PRICE OKAMOTO HIMENO & LUM, a Law Corporation,

Respondent.

On Petition For A Writ Of Certiorari To The Intermediate Court Of Appeals Of The State Of Hawaii

REPLY BRIEF

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TABLE OF CONTENTS

	Page
INTRODUCTION	1
ARGUMENTS	4
A. THIS COURT HAS JURISDICTION	4
B. PETITIONER'S QUESTIONS DID NOT RAISE STATE LAW AS SHOWN BY THE AUTHORITIES HEREUNDER	6
C. PETITIONER RAISED HER FEDERAL QUESTIONS IN THE STATE COURT	8
D. THE JAPAN JUDGMENT WAS NOT PROPERLY ADMITTED	11
CONCLUSION	13

TABLE OF AUTHORITIES

Page

CASES

Abie State Bank v. Bryan, 282 U.S. 765 (1931).....5

Abraham v. S. E. Honorato Garages, 50 Haw. 639, 446 P.2d 821 (1968).....9

Adams v. Robertson, 520 U.S. 83, 117 S.Ct. 1028 (1997).....6

Allstate Ins. Co. v. Hague, 449 U.S. 302 (1981).....10

Belhater and Cox v. Irmish, 75 F.R.D. 539 (1977).....9

Bremer v. Weeks, 104 Haw. 43 (2004).....9

Cromwell v. County of SAC, 96 U.S. 51 (1877).....10

Danforth v. Minnesota, 128 S.Ct. 1029 (2008) 7

De Saussure v. Gaillard, 127 U.S. 216, 8 S.Ct. 1053 (1888).....2, 5

Donovan v. City of Dallas, 377 U.S. 408 (1964).....6, 7

Exotic Hawaii-Kona, Inc. v. E.I. Dupont DeNemours and Co., 104 Haw. 358 (2004).....9

Flint v. Mackenzie, 53 Haw. 672, 501 P.2d 357 (1972).....9

Hawaii v. Office of Hawaiian Affairs, 129 S.Ct. 1436 (1999).....5, 6, 7

Hilton v. Guyot, 159 U.S. 113, ___ S.Ct. 139 (1895).....7

TABLE OF AUTHORITIES – Continued

Page

Koven v. Saberdyne Systems, Inc., 128 Ariz. 318, 625 P.2d 907 9

Linkco Inc. v. Nichimen Corp., 164 F. Supp. 2d (2003).....9

Michigan v. Long, 463 U.S. 1032 (1983).....5

Pioneer Mill Co. v. Dow, 90 Haw. 289, 978 P.2d 727 (1999).....8

PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980).....6

Richards v. Jefferson County, 517 U.S. 797 (1996).....6

Roxas v. Marcos, 89 Haw. 91, 969 P.2d 1209 (1999).....12

Shoei Kako Co. v. Superior Court of California, 33 Cal. App. 3d 808, 109 Cal. Rptr. 102 (1973).....2

State v. Grindling, 96 Haw. 402, 31 P.3d 915 (2001).....10

Taylor v. Sturgell, (US) 128 S.Ct. 2161.....7

Touche Ross, Ltd. v. Filipek, 7 Haw. 473, 778 P.2d 721 (1989).....8

Ward v. Love Country, 253 U.S. 17 (1920).....4

RULES:

Rule 15(2), Supreme Court Rules 1

Rule 202(c)(5), HRE.....12

TABLE OF AUTHORITIES – Continued

Page

Rules 8(c), 9(d)-(e), HRCP 8

Rule 44.1, HRCP.....12

Rule 56, HRCP.....4

FOREIGN AUTHORITIES:

Article 108, Japan Code of Civil Procedure.....8

Article 118, Japan Code of Civil Procedure.....9

INTRODUCTION

Respondent's statements are misleading, even false. The appeal Court ("Court below") did not claim to use "Hawaii law." It simply cited sections of the Hawaii Rules of Civil Procedure and Rules of Evidence. (App. 8, Pet.). These rules are patterned after the federal rules, even identically worded. They are not independent and adequate statutes for Hawaii. Petitioner described the manner she raised her federal issues from the trial court to the appeal court. (App. 4-5, Pet.). Respondent simply concluded that there are no federal questions after its "review of the appellate decision including the cited pages." (p. 9, Opp.). This conclusion is insufficient. Rule 15(2), Supreme Court Rules. Petitioner's federal questions must have been decided, or the Court could not decide, as follows:

> In light of the Japan judgment and its effect under Japan law, there is nothing in the record establishing that POHL could have executed the U.S. District Court judgment in Japan.[1]

Meaning, in addition to the above, the Court decided that the Japan judgment rendered without Japan process is valid; it has authority to restrain enforcement of the federal judgment, decide for a Japan

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[1] On its face, infringement into federal judgments and deciding what a foreign nation should do with federal judgments ARE NOT STATE LAW ISSUES. They are federal questions that involve Constitutional jurisdiction of the Courts.

Court; and *res judicata* has attached to non-parties of the Japan judgment. In her Opposition to the Motion at the trial Court, Petitioner claimed, the State Court cannot infringe upon a federal Court and a Japan Court as she cited *Shoei Kako Co., Ltd. v. Superior Court of California*, 33 Cal. App. 3d 808, 109 Cal. Rptr. 102 (1973). The Hawaii Court "cannot decide what the Japan nation would do if enforcement of the federal judgment is sought," explained this case, to the point. (R., v. 4, at 154). Petitioner's federal questions by "necessary effect" had been decided against her. *De Saussure v. Gaillard,* 127 U.S. 216 (1888). This Court has jurisdiction.

Respondent claims Petitioner's opening brief in the appeal Court is defective. (p. 9, Opp.). It did not complain before, and the Court below did not so find. The decision, in fact, confirms the errors listed therein are not all that Petitioner raised, but everything was considered, as follows:

> Upon careful review of the record and the briefs submitted by the parties and having "given due consideration" to the arguments advanced and the issues raised by the parties, we resolve Dominguez's points of errors as follows:
>
> . . .
>
> Any other arguments "raised" by Dominguez that are not specifically addressed herein are without merit.

(App. 8, Pet.; 2nd paragraph is a "footnote").

That was in addition to what Petitioner raised according to the Court: Issues of "Japan law, orders and judgment"; pleading affirmative defenses and authentication of exhibits; and the "correct application of U.S. and Japan laws". (App. 6, Pet.). The Court below could have said "Hawaii laws", but used "U.S. laws."

Respondent claims as defense the un-appealed 1992 Japan judgment before the parties entered into a counsel agreement in 1994. (pp. 2-3, Opp.). In spite of the evidence on record, 1993 was omitted, before the federal judgment when Respondent was retained and then controlled the case. (R., v. 4, at 242-43; App. 2, Pet.). Respondent resorted to a patently false statement not borne by the records – that Petitioner "admitted" there was absolutely nothing Respondent could have done as of Feb. 1994 to undo her legal malpractice; and it was undisputed that the Tokyo Court absolved the Japanese corporation. (p. 3, Opp.). None was correct. If true, the parties would not be before this Court. The assets of the company are only in Japan, repeatedly states Respondent. (pp. 4, 5, 16, Opp.). This speculation is the result of its own malpractice of failing to locate assets and to enforce the U.S. District Court judgment which even Japan would have recognized under its Code. (App. 39, Pet.).

The clients were not served Japan process and received no Japan judgment. (R., v. 4, at 210-27). There was nothing to appeal in Japan. The purported

authorities of Respondent are to no avail.[2] Respondent claims federal questions must be substantial. (p. 10, Opp.). Petitioner agrees. What could be more substantial than the State Court creating clouds on U.S. District Court judgments and restraining their enforcement prospectively and retroactively; deciding what an independent nation must do; absolving foreign investors from adverse federal judgments; allowing lawyers to be privies of their clients' opponents to a foreign nation's void default judgment.

ARGUMENTS

A. THIS COURT HAS JURISDICTION.

This Court has long recognized that it is within its province to inquire whether a federal right was denied by a state court "in substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support," and that this inquiry "cannot be disregarded without neglecting or renouncing a jurisdiction conferred by law and designed to protect and maintain the supremacy of the Constitution and the laws made in pursuance thereof." *Ward v. Love Country,* 253 U.S. 17, 22-23 (1920). In other words, "it is incumbent upon this Court, when it is urged that the decision of

[2] The Japan judgment was not known, not in evidence in the malpractice trial, clearly shown in the verdict. (R., v. 4, at 148-49).

the state court rests upon a non-federal ground, to ascertain for itself, in order that constitutional guaranties may be appropriately enforced, whether the asserted non-federal ground independently and adequately supports the judgment." *Abie State Bank v. Bryan*, 282 U.S. 765, 773 (1931).[3]

In *Hawaii v. Office of Hawaiian Affairs*, 129 S.Ct. 1436 (2009), the issue was an injunction against sale of trust lands. Respondent therein argued against the jurisdiction of this Court because the Hawaii Court specifically decided "under state law". But this Court held, it has jurisdiction whenever "a state court decision fairly appears to rest primarily on federal law or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." It cited *Michigan v. Long,* 463 U.S. 1032, 1040-41 (1983), *id.* at 1442. This Court has jurisdiction if the federal question has been, either in express terms or by necessary effect, decided against the Plaintiff in Error. *De Saussure v. Gaillard,* 127

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[3] As discussed in the Petition, the decision below relied on irrelevant local cases "without fair and substantial support." It consisted of impossible or unrealistic facts. It held: The Japan judgment is not an avoidance or affirmative defense, it is simply a "denial of causation"; A past English letter authenticated the future judgment in Japanese language; The admission of the Japan judgment is a "judgment call" of the Judge citing a case of criminal sexual assault where "credibility of the complainant" was in issue – despite rules and case precedents to the contrary. (pp. 7, 9-10, Pet.).

U.S. 216 (1888). Either "raising of the issues" below "or" "decision of the issues" by the appeal Court would give this Court jurisdiction. *Adams v. Robertson*, 520 U.S. 83, 86 (1997). Petitioner complied with both. At the very least, the adequacy and independence of any possible state law ground is not clear from the decision of the Court below. Hence, this Court would have jurisdiction. *Hawaii v. Office of Hawaiian Affairs*, supra.

B. PETITIONER'S QUESTIONS DID NOT RAISE STATE LAW MATTERS AS SHOWN BY THE AUTHORITIES HEREUNDER.

Petitioner did more than what the parties did in the following cases. In *Richards v. Jefferson County*, 517 U.S. 797 (1996), citing *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 85-87 (1980), this Court held that because petitioners raised their due process challenge to the application of *res judicata* in their application for rehearing to the Alabama Supreme Court, that federal issue has been preserved for our review.

The similarity of Petitioner's situation with a case cited in her Petition cannot be ignored. In *Donovan v. City of Dallas*, 377 U.S. 408 (1964), this Court said: "Petitioners being properly in the federal court had a right granted by Congress to have the court decide the issues they presented . . . " What is before us is "the propriety of a state court's punishment of a federal-court litigant for pursuing his right

to federal-court remedies . . . That right was granted by Congress and cannot be taken away by the State." *Id.* at 413.

Issue of conflict of laws and foreign judgments is a federal question. The effect to be given to foreign judgments is altogether a matter of comity in cases where it is not regulated by treaty. *Aetna Life Insurance Co.*, 223 U.S. 186 (223), citing *Hilton v. Guyot*, 157 U.S. 166, and other cases. For judgments in federal-question cases, federal courts participate in developing uniform federal rules of *res judicata*, which the United States Supreme Court has ultimate authority to determine and declare. The federal common law of preclusion is subject to due process limitations. *Taylor v. Sturgell* (US) 128 S.Ct. 2161.

Referring to the sovereignty of States to construe Congressional documents and laws, this Court held, "that maxim is not a judicial license to turn an irrelevant statutory provision into a relevant one." . . . "a court has no license to make it do what it was not designed to do." *Hawaii v. Office of Hawaiian Affairs*, supra, at 1444. What the Court below did was more egregious. It ignored relevant decisions and applied irrelevant decisions. (pp. 7, 9, 10, Pet.). Then, it decided for Japan. (App. 9, Pet.).[4]

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[4] In a footnote, Respondent vaguely cited *Danforth v. Minnesota*, 128 S.Ct. 1029 (2008). That case actually said that retroactivity of new rules . . . is a federal question. *Id.* at 1047.

C. PETITIONER RAISED HER FEDERAL QUESTIONS IN THE STATE COURTS.

Petitioner objected to issues of Japan judgment, Order, and Laws because they were not pleaded as mandated by law. (R., v. 4, at 12-14). She had no opportunity to meet the issue.[5] She filed her Opposition quoting Rules 8(c), 9(d)-(e) Hawaii Code of Civil Procedure requiring pleading of any avoidance or affirmative defense, listing *res judicata*, providing the manner to plead them; and she presented Hawaii cases in point including *Touche Ross, Ltd. v. Filipek*, 7 Haw. 473, 778 P.2d 721 (1989). (R., v. 4, at 143-144). Petitioner contested the Japanese exhibits of Respondent as unauthenticated. She presented numerous cases disallowing such evidence including *Pioneer Mill Co. v. Dow,* 90 Haw. 289, 978 P.2d 727 (1999) which held that the affidavit of counsel did not authenticate the exhibits that were not certified by their preparer or custodian. Petitioner presented that the Japan judgment was void for no process served upon the clients and quoted and submitted Art. 108 of the Japan Code of Civil Procedure (JCCP). (R., v. 4, at 150-51; App. 39, Pet.). She argued the validity of the federal judgment. It should not be infringed; It should

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[5] Respondent's Motion for Summary Judgment was filed Dec. 14, 2005. The hearing was on Jan. 19, 2006. The judge did not wish to postpone. She insisted on a non-scheduled "jury trial" for Respondent's damages within a week from her telephone call pending Motions for Reconsideration. She refused recusal for a disclosure after about two years into the case, of her close ties with Respondent's law office. (R., v. 8, at 36-63).

be enforced. She quoted and submitted Art. 118 (JCCP) that would allow enforcement of foreign judgments in Japan. (R., v. 4, at 153-54; App. 39, Pet.). If there was truly a defect in service of the federal lawsuit, that could be cured by a *nunc pro tunc* Order. She cited *Belhalter and Cox v. Irmish*, 75 F.R.D. 539 (1977). Petitioner argued against preclusion, commonly called *res judicata*. She listed the requirements and cited *Bremer v. Weeks*, 104 Haw. 43 (2004); *Exotic Hawaii-Kona, Inc. v. E.I. Dupont DeNemours and Co.*, 104 Haw. 358 (2004). Petitioner claimed that Respondent had no privity, "no standing" to place itself in the position of the Japanese Company. She cited *Koven v. Saberdyne Systems, Inc.*, 128 Ariz. 318, 625 P.2d 907. (*Id.* R. at 159). Petitioner argued there can be no judgment as a matter of law since there are genuine issues of material facts under Rule 56, HRCP. She cited numerous authorities including *Abraham v. S.E. Honorato Garages,* 50 Haw. 639, 446 P.2d 821 (1968). (*Id.* R. at 162). Petitioner claimed summary judgment should be for her. She cited *Flint v. Mackenzie,* 53 Haw. 672, 501 P.2d 357 (1972). She asked for her right to a trial, her "day in court." (*Id.* R. at 162). In her Motion for Reconsideration, Petitioner re-emphasized her points. (R., v. 6, at 1-10). She quoted from Respondent's authority, *Linkco Inc. v. Nichimen Corp.*, 164 F. Supp. 2d (2003). The Court there said the foreign judgment can be discarded where the foreign court lacked subject matter jurisdiction or the foreign judgment conflicts with another final judgment that is entitled to recognition. (*Id.* R. at 6).

In her Opening Brief in the Court below, Petitioner laid out and re-presented all her above issues, in fact, with more authorities. (pp. 22-31, Opening Brief). She argued that Respondent has collaterally attacked the U.S. Court judgment – that which it earned for its clients. The trial court allowed infringement and made "the U.S. judgment to be ineffective" through Respondent's attack "of the U.S. judgment." (p. 31, Opening Brief). She quoted numerous cases including *State v. Grindling*, 96 Haw. 402, 405, 31 P.3d 915, 918 (2001). She argued that the trial Court gave credit to the Japan judgment results in *res judicata*. She laid out the requirements for the doctrine: Identical parties and issues in the Japan case and in this case between the parties, and litigation on the merits in the Japan case. All such requirements were missing. She cited relevant decisions of this Court such as *Cromwell v. County of SAC*, 96 U.S. 51 (1877) discussing *res judicata* or judgment estoppel and due process; and *Allstate Ins. Co. v. Hague,* 449 U.S. 302 (1981) discussing requirements for full faith and credit similar to *res judicata*. A foreign nation is not in a better position than a sister State. (pp. 29-30, Opening Brief). In her Reply Brief, she re-presented *res judicata* and called the Court's attention to the absence of counter-arguments on this issue and on the adjudged malpractice errors of Petitioner. (pp. 7-8, Reply). In her Motion for Reconsideration in the Court below, she again asked for a reversal, for her Constitutional right to a trial. (pp. 1-7, Motion for Recon.). She re-presented her issues to

the State Supreme Court, and the petition was denied. (App. 34, Pet.).

D. THE JAPAN JUDGMENT WAS NOT PROPERLY ADMITTED.

In its Counterstatement of Questions Presented, Respondent presents a new issue – that the foreign "pleadings and law" (not Japan judgment) negated the causation element of Petitioner's claim. The issue is clear: Is the "Japan judgment" valid, and be a bar of the federal judgment, applied against Petitioner and in favor of Respondent who were both strangers to the judgment? This is a *res judicata* issue.

Respondent resorts to another patently false or misleading statement: that the Japan judgment and the evidence of service were each certified on Nov. 9, 2005 by the clerk of the Tokyo District Court. (p. 13, Opp.). The exhibit of Respondent was just an UNSIGNED, UNSEALED AND UNATTESTED print. (R., v. 3, at 266-69; 281-83). Or, Kuwahara's letter was not needed to "prophesize." Respondent and the lower Court claim that the letter to Japan and the Tokyo Complaint were "offered" by both parties. (p. 14, Opp.). This statement is untrue and unjust. Petitioner only made reference to those documents for her arguments. For instance, she stressed that the letter of Kuwahara to the Japan Court informing them of the pendency of the federal case stated, "Finally, this letter is not to be construed as a pleading and Mr. and Mrs. Barnedo's appearance and their submission to

this Court." (R., v. 3, at 127-29). Respondent states that certification is unnecessary if a reasonable opportunity was given to investigate. (p. 13, Opp.). The Motion is not a reasonable opportunity, which is why the rules need pleading of the judgment. The Judge never allowed Petitioner any opportunity explained above. (R., v. 8, at 36-63).

Respondent cites a single Hawaii case in regard to judicial notice of laws of foreign countries under the Rule 202(c)(5) Hawaii Rules of Evidence, and Rule 44.1, Hawaii Rules of Civil Procedure. *Roxas v. Marcos*, 89 Haw. 91, 117, 969 P.2d 1209, 1235 (1999). (p. 15, Opp.). But the Court there did not apply either rule. It had no opportunity to test and construe because "the parties never addressed Philippine law." Instead, the decision there mentioned the requirements for estoppel by judgment as a bar or preclusion: identity of parties and issues, and judgment on the merits in the first case. *Id.* at 119; 1237.

CONCLUSION

The Petition should be granted. Nothing appears in the decision below as to the adequacy and independence of any possible State Hawaii law. The issues are clearly federal, raised, and had to be included in the decision below.

Respectfully submitted,

ERLINDA DOMINGUEZ
Petitioner Pro Se